Supreme Court, U.S.
FILED

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In the
Supreme Court of the United States

STEVEN HENRY ARTHUR ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY, LTD.; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY, LTD.; NORTHERN ASSURANCE COMPANY, LTD.; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY, LTD.; FOLK SAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD.; SCOTTISH LION INSURANCE COMPANY, LTD.; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; and DAI-TOKYO INSURANCE COMPANY (U.K.) LTD.

Petitioners

VERSUS

AMERICAN EAGLE MARINE, INC., and AK STEEL CORPORATION, formerly known as Armco Steel Company, L.P.

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

STEVEN HENRY ADAMS, et al	*	Docket No.
	*	94-CV-1954-K
V.	*	New Orleans, LA
	*	June 18, 1998, 9:00 a.m.
UNIONE MEDITERRANEA	*	
DE SICURTA, et al	*	

EXCERPT FROM THE TRANSCRIPT
OF THE PROCEEDINGS HELD BEFORE
THE HONORABLE STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT JUDGE PRESIDING

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer..

EXCERPT

THE COURT: This action was tried to the Court without a jury commencing June 15, 1998, and the Court, having thoroughly reviewed the record, the evidence adduced at trial, including deposition testimony, memoranda and the relevant law, hereby orally renders its order and reasons for judgment in open court. To the extent that any findings of fact are conclusions of law, they are adopted as such. To the extent that any conclusions of law are findings of fact, they are so adopted.

The matter concerns a quantity of sunken steel cargo which was lost in 1993 and subsequently salvaged in 1995. There are two primary areas of dispute before the Court. The first is an insurance coverage dispute and the second concerns a title dispute to the salvaged cargo.

On or about September 16, 1993, a cargo of 1,290 steel slabs was loaded aboard the M/V TURANDOT in Taranto, Italy, for transport to New Orleans, Louisiana. The slabs were manufactured in Genoa, Italy, by Ilva, S.p.A. ("Ilva") and consigned to Duferco, S.A., for resale in the United States. The vessel arrived in Darrow, Louisiana, on or about October 8, 1993. At Darrow the slabs were transhipped onto 16 barges owned and operated by Canal Barge Company ("Canal Barge") for further carriage to Cincinnati, Ohio. The barges that were used for this shipment were neither inspected by the U.S. Coast Guard nor classified by the American Shipping Bureau, Lloyd's Register, the Registro Navale Italiano, or any other certified-in-classification society. A.K. Steel Corporation ("A.K. Steel") of Middletown, Ohio (formerly known as ARMCO Steel Company) had agreed to

purchase the subject steel slabs from Duferco for use in the production of hot-rolled coils. The barges left Darrow under tow of the tug BILL ANDREWS on October 12, 1993.

Canal Barge, the barge carrier, procured open cargo/shippers' interest policy of insurance with plaintiffs, evidenced by Certificate of Insurance No. 8455, to cover the inland transport of the slabs from Darrow, Louisiana, to Cincinnati, Ohio. The policy was effected with plaintiffs through Global Special Risks, Inc. ("GSR"). Canal Barge was the named insured on plaintiffs' policy, while Duferco was named as an additional assured.

On October 16, 1993, barges CBX-207 and CBX-214 sank in the lower Mississippi River near Vicksburg, Mississippi, and the cargo was lost. The cargo aboard those two barges consisted of approximately 158 slabs, valued at $922,589.82. Duferco owned the steel slabs at the time of the sinking.

Both Duferco and Canal Barge had insured the steel cargo during barge carriage upriver. Duferco had declared the subject shipment of 1,290 steel slabs under Open Cargo Policy No. 1381/111, which it had procured on August 31, 1993, from UMS Generali Marine, S.p.A. ("UMS") providing coverage for a cargo for transport to the United States. The policy of insurance was written and issued by UMS, an Italian insurance company, at its principal place of business located in Genoa, Italy, and delivered to Duferco, S.A., a Swiss company, at its offices in Lugano, Switzerland.

After the accident Duferco notified UMS of the loss by letter dated October 18, 1993, and included a preliminary

notice of claim against UMS. Duferco subsequently made a statement of claim which UMS received on November 3, 1993. UMS Exhibit 8, Plaintiffs' Exhibit 13. Immediately after the loss UMS retained legal counsel and marine surveyors to investigate the casualty and explore the possibility of salvaging the steel slabs. UMS maintains that its participation in any salvage attempt was on a "without prejudice" basis by virtue of its own statements to that effect and provisions of Italian law. Italian Civil Code Article 1914.

Duferco hired the Italian Claims Agency ("ICA") as its agent for purposes of coordinating salvage of the cargo, among other things. ICA in turn hired American Eagle Marine, Inc., ("American Eagle") to salvage the steel pursuant to a salvage contract entered on January 31, 1994. Plaintiffs' Exhibit 24. In connection with the salvage effort, UMS advanced to Duferco certain sue-and-labor costs for the salvage effort, which totaled $191,000. UMS Exhibit 7. UMS urged Duferco to make a claim for insurance against Canal Barge and plaintiffs as early as November 25, 1994. Plaintiffs' Exhibit 17.

UMS denied coverage of the claim on March 14, 1995, per letter addressed to Duferco. UMS stated the following reasons for denial of the claim:

"One of the most important point (sic) which were considered when the policy -- contract was underwritten was your commitment to load your cargo on board of adequate high standard means as per our particular instructions and mutual agreement."

"As you have unfortunately unattended this warranty, we cannot accept and settle your claim, mainly for the above reasons, in addition to the other ones explained to you during the meeting."

UMS Exhibit 8, Plaintiffs' Exhibit 23. By this letter it appears that failure to warrant proper loading was the main reason for denial of coverage. On March 23, 1994, Duferco wrote back and mentioned the other reasons for denial of the claim that were discussed "during the meeting" which took place prior to the March 14, 1994 denial by UMS. Plaintiffs' Exhibit 24. Duferco mentioned its delay in abandoning the cargo and, based on this letter, the inference can be drawn that Duferco put off abandoning the cargo while its attempt to salvage the cargo was ongoing. In this letter Duferco also communicated its intention to claim indemnity directly from Canal Barge based on its policy with plaintiffs and further stated, "Should these insurers reject in full or in part our claim, we shall he forced to return to you on the subject." Id.

UMS did not deny coverage under the policy based on Duferco's failure or inability to properly abandon the cargo, nor did UMS state that under the special circumstances of this case there was never any coverage. There is no evidence that UMS invoked this defense in its March 14, 1994 denial of the claim or that it was discussed at the meeting prior to the denial, when other reasons for denial of the claim were given.

Even if the impossibility of abandonment was discussed, the abandonment defense was not important enough to UMS for it to include in the letter denying coverage. Instead, and in stark contrast to its position today, UMS' use

of the term "total loss" in its March 1994 letter of denial evidences UMS' interpretation that a "total loss" could be and was made by Duferco. UMS begins its letter denying the claim by mentioning the claim for total loss:

"We refer to the above damage and to the claim for $926,369.19, which you sent on November 3, 1993, about the total loss of M/T 3,062,040 of slabs..."

Plaintiffs' Exhibit 23. UMS used the term "total loss" without qualification and failed to mention that the UMS policy and Italian law may preclude Duferco from declaring the sunken cargo as a "total loss." The only issue at the time of denial referencing abandonment was when Duferco might abandon the cargo, not whether Duferco could abandon the cargo as a "total loss" under the UMS policy and Italian law.

Once UMS denied coverage on the claim, Duferco sought recovery from plaintiffs' policy. As mentioned, UMS urged Duferco to claim against plaintiffs and Duferco notified UMS of its intent to do so per its letter of March 23, 1994.

Between January 31, 1994, and July 6, 1994, American Eagle made no attempt to salvage the cargo. Doug Adams, who testified on behalf of American Eagle, stated that the water was too high to salvage the property in the early part of 1994. On July 6, 1994, ICA canceled the salvage contract with American Eagle. Plaintiffs' Exhibit 27. Victor Bruzzone, who testified on behalf of ICA, stated that he was instructed by Duferco to cancel the salvage contract so that Duferco could declare the cargo as a constructive total loss.

Per letter dated July 6, 1994, ICA canceled the salvage contract with American Eagle and explained that "We are instructed by Duferco, S.A., to cancel said contract of salvage as cargo has been abandoned." Plaintiffs' Exhibit 27. Bruzzone testified that Duferco had not told him that they were "abandoning" the cargo; rather, Bruzzone picked up the term "abandon" from an attorney acting on behalf of Duferco. According to Bruzzone, the purpose of the letter from ICA was to simply cancel the contract for salvage; the letter put American Eagle on notice of Duferco's intent to abandon the cargo.

Doug Adams testified that when he received the letter he understood that the contract was canceled and that Duferco was abandoning the cargo. Several weeks later, per letter dated July 28, 1994, Duferco notified Canal Barge and its attorneys that it was abandoning the cargo and requested that Canal Barge notify its underwriters of same. Plaintiffs' Exhibit 28. The notice of abandonment did not specify that Duferco was abandoning the cargo to plaintiffs.

Meanwhile, Canal Barge had made a claim of insurance against plaintiffs based on its policy of insurance and plaintiffs filed a declaratory judgment action on June 10, 1994, against Canal Barge, UMS, Duferco, Ilva and A.K. Steel seeking determination of the rights and liabilities of all parties with respect to the contracts of insurance. The Court notes that Ilva, Canal Barge and Duferco are no longer parties in this litigation.

Duferco abandoned the cargo on July 28, 1994, and plaintiffs refused to accept the abandonment until

February 1, 1995. Plaintiffs, Exhibits 30 and 40. On July 28, 1994, Duferco confirmed that it owned the sunken cargo at the time of the loss and notified Canal Barge and its underwriters that it had abandoned the cargo because "the salvage of the cargo was impossible due to river conditions." Plaintiffs' Exhibits 28 and 30. A.K. Steel confirmed that it did not own the sunken cargo and assigned any and all of its rights to the sunken cargo to Duferco. Plaintiffs' Exhibit 34. Plaintiffs refused the abandonment, as evidenced in pleadings filed with the Court on August 23, 1994. Record Document 4, American Eagle Exhibit 5.

In response to the Court's September 13, 1994 ruling, plaintiffs made partial payment to Duferco in the amount of $986,352.41 (representing payment of principal, less deductible, plus interest) in exchange for an assignment of Duferco's rights, if any, against UMS. Plaintiffs' Exhibit 40 and 42. Plaintiffs and Duferco executed an Assignment and Subrogation Receipt in return for payment on the claim which was signed on January 25, 1995, and executed on February 1, 1995. Id.

By its terms, the Assignment and Subrogation Receipt provides "You are entitled at your option to take over our interest in whatever may remain of the goods, it being understood that delivery to you of the document of title relating to the goods shall not be construed as an exercise of such option." Plaintiffs' Exhibit 40. On February 1, 1995, Duferco transferred any and all of its ownership interest in the cargo to plaintiffs.

The Court finds that Duferco abandoned the cargo to

plaintiffs on July 28, 1994, which abandonment became effective with the transfer of title to plaintiffs on February 1, 1995. Duferco abandoned to plaintiffs, not UMS. Duferco did not obtain the written consent of UMS prior to execution of the Assignment and Subrogation Receipt.

The testimony of Mr. DeOrchis, attorney for Duferco, confirms that as of February 1, 1995, plaintiffs "owned" the sunken cargo. According to Mr. DeOrchis, Duferco wished to purchase the sunken cargo in late February or early March 1995. At that time the steel market was up and Duferco expressed its interest in purchasing back the sunken cargo from plaintiffs, who failed to respond to Duferco's inquiry. Though DeOrchis' testimony confirms that plaintiffs owned the cargo, it also confirms that plaintiffs made no effort to sell the sunken cargo. Michael Garin of Global Special Risks testified that plaintiffs had no intent of salvaging the cargo and took no steps to assert ownership to the sunken cargo prior to April 1995.

Meanwhile, American Eagle prepared to attempt salvage anew. Doug Adams, on behalf of American Eagle, testified as to the salvage of the steel in 1995 and the sale of the steel to A.K. Steel. Adams testified that he knew that Duferco had abandoned the steel based on the letter he received from ICA back in July 1994 cancelling the original salvage contract. At the time Adams was preparing to perform some other salvage jobs on the Mississippi River near Vicksburg in the area where the cargo sank. He remembered that the steel was still there and thought he might be successful salvaging it at this time. Adams saw the opportunity to get some more work in the area where he planned to have

his employees and equipment mobilized to perform the job. Adams had mentioned the possibility of salvaging Duferco's steel to his lawyer and he knew that he could not warrant title but merely the salvage rights to the steel.

American Eagle first contacted A.K. Steel regarding their interest in salvaging the sunken cargo in January 1995. Adams worked together with Fran Empey, a joint venturer, in the salvage, who testified at trial. Though both Adams and Empey knew that Duferco had previously owned the abandoned steel, neither knew initially that A.K. Steel had purchased the steel from Duferco. Rather, they contacted A.K. Steel on their own as a potential purchaser of the steel. Empey, at least, learned in talking to A.K. Steel that it had been the purchaser of the steel.

Initially Adams expected to sell the salvaged cargo for scrap. In his discussions with A.K. Steel and a number of other companies, however, Adams learned that the steel was more valuable than scrap and could fetch a higher price. Adams and Empey both testified that in order to know the market value of the steel a potential purchaser must know the chemistry of the steel in order to determine its application and value. The so-called "chemistries" are proprietary in nature. A.K. Steel, having purchased and possessed identical steel from Duferco, was in possession of those chemistries.

Empey testified that he contacted Duferco Steel, Inc., in the United States in an attempt to obtain the chemistries to the steel, but there was no testimony that this effort proved successful. Duferco Steel, Inc., relayed a message to

Duferco in Lugano on March 3, 1995, asking whether it could give away the steel chemistries to salvors or whether to refer them to the insurance company. A.K. Steel Exhibit 25. Duferco responded the next day granting permission to give away 'the chemistries. Id. By this exchange, Duferco was apparently not interested in purchasing the salvaged steel. More importantly, Empey testified that he did not receive a response from Linda Mertz.

According to both Adams and Empey, A.K. Steel made the only acceptable bid on the steel. on January 9, 1995, A.K. Steel offered to purchase the steel from American Eagle for $150 per ton. Plaintiffs' Exhibit 54. A.K. Steel did not demand that American Eagle warrant title to the slabs. One of the terms of its original offer, A.K. Steel requested American Eagle will "warrant and document that the slabs have been abandoned for salvage by the owner/underwriters." Lynn Riley confirmed in her deposition testimony that A.K. Steel wanted warranty of abandonment only, that it never demanded warranty of title, and that the documentation of ownership and abandonment supplied 'by American Eagle was satisfactory.

There was one higher offer of $180 per ton from David J. Joseph Company. A.K. Steel Exhibit 12. Ted Ernstberger testified on behalf of David J. Joseph Company. He stated that his company, which was A.K. Steel's scrap broker at the time, insisted that American Eagle warrant title to the steel, a term that American Eagle refused to accept. Adams knew that he could not warrant title to the salvaged steel, so A.K. Steel, which offered to purchase American Eagle's rights of possession to the salvaged steel, made the only acceptable

bid. As it turned out, A.K. Steel purchased the steel for approximately $176 per net ton pursuant to a purchase order dated March 8, 1995.

American Eagle commenced salvage on February 18, 1995, successfully completed salvage on April 26, 1995, and received final payment for the steel on April 27, 1995. American Eagle successfully salvaged 128 of the 158 sunken slabs. 127 of those slabs were sold and delivered to A.K. Steel and American Eagle kept the remaining slab.

Plaintiffs did not assert ownership interest in the steel until after the salvage operation was completed. There is no evidence that plaintiffs had any intent of asserting ownership, selling or salvaging the sunken cargo. Plaintiffs first learned of the salvage operation on April 24, 1997. Robert Lemon, counsel for Canal Barge, testified that on April 24, 1997, he phoned plaintiffs' counsel to inform him that the cargo was being salvaged. Robert Lemon testified he learned about the salvage from his client, Canal Barge. Adams confirmed that he called Canal Barge to inquire whether it was interested in salvaging its sunken barges.

Three days later, on April 27, 1995, plaintiffs wrote to various underwriters that it had "just learned" that American Eagle was on site and salvaging the sunken cargo without plaintiffs' consent. Plaintiffs' counsel requested authorization from plaintiffs to put American Eagle on notice of plaintiffs' ownership and title to the steel slabs, explaining that the slabs were then worth more than plaintiffs had paid for them. Plaintiffs stated that American Eagle's salvage would give

rise to a claim for salvage award, and added that plaintiffs "would have had to raise the steel slabs anyway at a significant cost to underwriters." American Eagle Exhibit 14. That same day plaintiffs' counsel put American Eagle on notice of its "right, title and interest in the steel slabs and claims that ownership." American Eagle Exhibit 15.

Adams confirmed that American Eagle did not halt delivery of the steel to A.K. Steel in response to plaintiffs' notification. A.K. Steel consumed the steel slabs, despite plaintiffs' notification of ownership and request not to do so. Neither American Eagle nor A.K. Steel offered the salvaged cargo to plaintiffs at any time and neither perfected a salvage lien or title action prior to plaintiffs' quiet title action which was filed on August 15, 1995.

The Court finds no bad faith on the part of American Eagle or A.K. Steel for the actions each took in salvaging, selling and purchasing the steel. First, Adams' testimony confirms that he knew that the salvaged steel had been abandoned by Duferco in July 1994. Adams knew that if he salvaged the steel he could claim a possessory right of salvage only since he did not own the steel. Adams specifically chose the one purchaser who agreed to this term, namely that American Eagle only warrant abandonment of the cargo but not warrant title. Adams accepted a significantly lower bid in order to obtain this term because the higher bidder insisted on warranty of title, which Adams knew he could not do. Likewise, A.K. Steel purchased the salvaged steel without warranty of title, assuming the risk that its title to the steel could be challenged by plaintiffs.

The Court is critically aware that the cargo would not have been salvaged but for the efforts of American Eagle and that American Eagle would not have bothered to salvage the cargo were it unable to line up an acceptable purchaser in advance of its efforts. American Eagle successfully salvaged 128 slabs of steel, and did so in good faith, notwithstanding American Eagle's failure to halt delivery of the salvaged steel to plaintiffs on April 27, 1995, upon their assertion of ownership. A.K. Steel purchased the salvaged steel in good faith without warranty of title and immediately consumed the steel into production.

The Court finds no "bad faith" on either American Eagle or A.K. Steel based on their unresponsiveness to plaintiffs' demand that sale, delivery and consumption of the salvaged steel should halt at the instant it asserted its ownership interest. The letter of July 6, 1994, stated that the cargo was abandoned. Significantly, the letter did not provide that the cargo was abandoned to underwriters or anyone else.

The Court heard testimony on the nature and difficulty of the salvage operation. It is uncontested that American Eagle received $525,424.32 from A.K. Steel for the salvaged steel slabs, that American Eagle expended $450,198.91 in the salvage effort and netted a profit of $75,225.41. J. Kenneth Edgar offered expert testimony on the salvage operation undertaken by American Eagle. Edgar opined that the expenses incurred by American Eagle were reasonable based on the nature and complexity of the salvage. Edgar explained that the vessel sank atop one of the sunken barges,

making the salvage operation more difficult and subjecting the operation to further changes in weather and river conditions. Both Edgar and Adams noted that the barges were covered by sand and silt, that river traffic and changing currents added to the risk and difficulty of performing the job.

Adams explained the significant danger and skills involved in doing the job. Divers outfitted with air tanks were required to decompress, descend a tube 30 inches in diameter, which delivered them to the sunken barges that were submerged 60 feet underwater. There the divers labored amid the silt and sand in the muddy water with virtually no visibility whatsoever. There is no doubt that the salvage effort required considerable skill, daring, risk and hard work.

Plaintiffs offered no evidence that the salvage effort was negligently performed, that the salvage expenses were unreasonable, that the job could have been more efficiently, easily or successfully performed. On cross-examination Adams admitted that the waters might be lower at a different time of year, but remarked that such advantage would have been offset by the facts that American Eagle was mobilized to perform the salvage work when it did, since it had other jobs in the area during that period, and that the cargo would have sunken to further depths over time, rendering any salvage task more difficult.

Adams took the initiative to salvage the sunken slabs and bore the risk, difficulty and expense involved. Absent Adams' efforts, there would be no steel to claim since plain-

tiffs evidenced no interest salvaging the steel until after it surfaced. The Court notes that apart from a generic threat, plaintiffs took no emergency legal action back in May 1995 to gain possession of the cargo, halt delivery or prevent consumption.

The Court heard expert testimony on the value and quality of the steel. George Hynson, testified that the value of the steel at the time of salvage was approximately $341.90 per metric ton, F.O.B. Vicksburg. This value reflects the so-called "spot market" price, a term which refers to market prices for steel available at that time, which vary from pre-arranged, negotiated steel prices. Hynson acknowledged that this figure could be downwardly adjusted by several factors:

First, converting the "per metric ton" price to a "per net ton" price reduces the figure to $307.71 per net ton.

Second, Hynson's price did not deduct freight charges from New Orleans to Vicksburg in the amount of $3.00 per ton, which reduces the price to $303.71 per ton. This mobilized to perform the salvage work when it did, since it had other jobs in the area during that period, and that the cargo would have sunken to further depths over time, rendering any salvage task more difficult.

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The Court heard expert. testimony on the value and quality of the steel. George Hynson testified that the value of the steel at the time of salvage was approximately $341.90 per metric ton, F.O.B. Vicksburg. This value reflects the so-called "spot market" price, a term which refers to market prices for steel available at that time, which vary from pre-arranged, negotiated steel prices. Hynson acknowledged that this figure could he downwardly adjusted by several factors:

First, converting the "per metric ton" price to a "per net ton" price reduces the figure to $307.71 per net ton.

Second, Hynson's price did not deduct freight charges from New Orleans to Vicksburg in the amount of $3.00 per ton, which reduces the price to $304.71 per ton. This figure is not far off from competitive "spot market" prices around the time for steel with known chemistries to the purchaser. A.K. Steel received "spot market" price quotes in May 1995 ranging from $250 up to $300 per ton, depending on manufacturer, quality and terms of delivery. Plaintiffs' Exhibit 93. The Court finds, based on Hynson's testimony and the documents in Plaintiffs' Exhibit 93, that the $300 figure is the value per net ton of the steel before adjustment for the chemistries factor.

Third, Hynson testified that if the chemistries to the steel slabs were unavailable the price could be reduced by 5 to 20 percent. Based on Empey's testimony, only A.K. Steel

and Duferco possessed the chemistries to the steel. The Court finds it appropriate to reduce the steel price by 20 percent based on the facts that the steel was salvaged and, though not impaired from submergence, any purchaser would be concerned about the possible damage from submergence or salvage, and any purchaser except A.K. Steel or Duferco would have had to test the steel in order to determine its value. Accordingly, the Court finds that the steel's "spot market" price at the time of salvage was approximately $240 per net ton. Thus the Court finds $240 per net ton a reasonable valuation of the sunken cargo at the time of salvage. A.K. Steel paid American Eagle $176 per ton for possession rights to the steel.

The Court finds that. the salvaged steel was not defective. Michael Monaco, an expert metallurgist, testified that there were no defects in the steel attributable to freshwater exposure. Monaco testified that the slabs were in prime condition, conceding some slight allowance for chemical defects in the range of 2 percent. Of the 10,444 Ilva slabs consumed, A.K. Steel reported 44 defects, so-called "cobble defects." There were 24 instances of finishing mill cobble and 20 instances of pipe cobble. "Pipe cobble" is a defect which occurs during casting and so-called "finishing mill cobble" is a defect which occurs at the coil production stage. A.K. Steel purchased cast steel and finished into steel coil; thus, A.K. Steel is responsible for introducing finishing mill cobble, but would not be responsible for the existence of pipe cobble defects. A.K. Steel reports that 20 of the first 5,660 slabs contained pipe cobble defects. A.K. Steel contends that the salvaged steel contained an unusually high percentage of pipe cobble and was, therefore, defective when

obtained by A.K. Steel.

The Court rejects A.K. Steel's contention on the basis of Monaco's testimony. Monaco agreed that A.K. Steel experienced a high rate of cobbling, but opines that the defect is more likely attributable to a finishing production than casting production. As Monaco explained, only 20 of 10,444 Ilva slabs contained the pipe cobbling. All 20 slabs containing the defect belonged to the first 5,660 slabs processed by A.K. Steel. There were no defects in the remaining 4,774 slabs. Monaco hypothesized that the pipe cobbling reported by A.K. Steel may have, in fact, resulted from a production error which was eventually corrected and resulted in the nonoccurrence of defect in the subsequently processed slabs. Additionally, Monaco testified that A.K. Steel received only two customer complaints referencing the Ilva steel, which is excellent in the industry.

The Court does not give much weight to the opinions of Johannes Schade, an expert witness who testified that the steel was defective. Although Schade stated that there was a high rate of pipe cobble defects in the steel, he is not a finishing mill expert and. the tests he performed were either inconclusive or not recorded and made available to plaintiffs' expert. Schade agreed, that the customer complaints on Ilva steel was low. In sum, the Court finds that the steel was not defective. Though the possibility of perceived defects may have affected what A.K. Steel's subjective valuation of the steel was at the time, this would not have affected the market value of the steel.

The Court has subject matter jurisdiction in this case

pursuant to 28 U.S.C. 1331(l) and Rule 9(h) of the Federal Rules of Civil Procedure. Italian law governs interpretation of the UMS policy as to the nature and extent of coverage.

UMS denies that its policy covers the loss on five grounds which the Court addresses in turn. Although plaintiffs paid Duferco for this cargo loss and took assignment of Duferco's rights under the UMS policy, they acquired no greater rights than those previously held by Duferco.

Considering the evidence, including the provisions of the UMS policy, the testimony of plaintiffs' expert on Italian law, Carlos Mastellone, and the testimony of UMS' expert on Italian law, Professor Alredo Dani, the Court concludes that UMS' defenses lack merit or have been waived. Therefore, UMS' policy provides coverage for this loss and UMS shall be required to pay its pro rata share of the loss which the Court has already determined to be four-fifths of the loss.

First, UMS contends that Duferco failed to abandon the cargo to UMS within the statutory limit. This ground consists of two elements: First, that abandonment was untimely; and, second, that Duferco could not abandon the cargo which sank with the two barges as this would be a "partial abandonment," which is not permitted under Italian law and the UMS policy. Article 11 of the General Conditions of the UMS policy provides that Duferco may abandon the goods to UMS and demand indemnity for total loss in the cases provided for by Article 541 of the Navigation Code. There is no doubt that any abandonment by Duferco was timely as both

ten months from the time of the accident in which to abandon the goods. Duferco abandoned the sunken cargo to plaintiffs on July 28, 1994, which was less than ten months of the accident on October 16, 1993.

The remaining contention is that Duferco was not permitted to abandon the cargo as a "total loss" under the terms of the policy and based on Italian law. This explanation requires the examination of Article 541 read in coordination with Articles 540 and 545. Article 541 provides:

"The insured can abandon to the insurer the goods and request the indemnity for total loss in the following cases:"

"(a) When the goods are totally lost;"

"(b) When the ship is presumed lost;"

"(c) When in the cases foreseen in '(a)', of the preceding article, from the date of the loss or of the unseaworthiness of the vessel, three months have elapsed for the perishable goods or six months have elapsed for those not perishable without the goods having been recovered and loaded for the continuance of the voyage;"

"(d) When irrespective of any expenses whatsoever the damages for deterioration or loss in quantity exceeded three-quarters of the insurable value."

According to Professor Dani, Duferco cannot abandon the cargo as a total loss under Article 541. First, he stated that Duferco cannot invoke Article 541(d) because the

sunken cargo on the two barges did not exceed three-quarters of the insurable interest. Second, he states that loss of the two barges is not a "total loss" because it was not the whole shipment, i.e., all 16 barges were not abandoned. According to Professor Dani, Italian law does not recognize as a total constructive loss the loss of two of the 16 barges and partial loss is only applicable where the loss exceeds the insurable interest. Article 545 provides:

"The abandonment of the things insured must be effected without conditions.

"It must include all the things under risk for the insurer at the moment of the accident from which the abandonment arises and the rights belonging to the insured towards those third parties in relation with the same things.

"If the insurance does not cover the entire insurable value of the thing, the abandonment is limited to a part of the thing itself in proportion of the insured amount."

Professor Dani's reading of the Navigation Code produces an absurd result; namely, that Duferco could only recover for the cargo lost on two sunken barges by abandoning the entire shipment, i.e., all 16 barges. Further, Professor Dani states that Duferco does not have a claim for average since there was no damages to the steel. Under Professor Dani's view, the policy covers one shipment, which includes all the cargo; the way to avoid such an absurd result, according to him, is to separately declare each barge under the policy.

Mastellone interjects common sense into his reading of the code, giving effect to the concepts of reasonableness, fairness and protection of the insured. First, according to Mastellone, the transhipment of the steel from one ocean-going vessel to 16 barges renders it possible to view each sunken barge as a "total loss." This reading is not explicitly supported by the code. At the same time the UMS policy clearly contemplated inland river transport by barge, so it would be unreasonable to assume that the individual barges were not at risk of damage or sinkage. To believe that the code definition of "total loss" requires a minimum loss of 12 barges and perhaps all 16 barges strains every notion of reasonableness, equity and fairness.

Mr. Mastellone testified that the concept of equity, which he termed "reasonableness," weaves throughout the insurance code. Moreover, he testified that like in the United States, the law of insurance is designed to protect the of the insured. Certain code articles lend support to these concepts. For example, Article 545 permits partial a thing that is under-insured limited to that portion which is insured. This example produces an equitable result, namely, pairing the extent of coverage with the extent of the loss and thereby preventing waste as unfairness.

More importantly, the Court concludes that UMS waived the abandonment defense. Mr. Mastellone testified that Italian law recognizes the concept of waiver in connection with an insurance defense. The testimony was uncontradicted by Professor Dani. Though not discussed by the

Italian law experts, Article 546 provides one example of waiver of the abandonment defense. Article 546 provides that an insured is entitled to collect the indemnity for total loss if the abandonment is not objected to within 30 days.

The Court found facts which support a waiver of the abandonment defense. First, UMS did not offer the abandonment defense in connection with denial of coverage of the claim on March 14, 1994. The Court construes this omission as a recognition by UMS that a constructive total loss of one barge was covered according to the mutual intent of Duferco and UMS. This left Duferco with but one option, to claim against plaintiffs. Duferco was required to abandon the cargo in favor of plaintiffs in order to declare a constructive total loss under plaintiffs' policy. Duferco could only abandon to one insurer and UMS did not object to the abandonment to plaintiffs. Additionally, there is some authority under Italian law that Duferco's notice and filing of claim can be considered an effective notice of abandonment of the cargo by Duferco to UMS. This Court concludes as a matter of law that UMS waived the abandonment defense and cannot assert it as a coverage defense against plaintiffs, and the intent of the parties was that the policy provided coverage if a constructive total loss occurred to the cargo in any of the barges.

Second, UMS argues Duferco breached the classification warranty in the UMS policy. The Court concludes based on its reading of the UMS policy that Duferco did not warrant to classify the barges. UMS submits that the policy creates a warranty that Duferco classify the barges:

"The insurance is provided subject to the condition that the transport, in relation to the marine voyage, be effected on ships or vessels in steel, classified in the first class of the Registro Navale Italiano or one of the following classification registers." UMS Policy General Conditions, Article 4.

UMS argues that Article 4 creates a warranty that the barges carrying the steel upriver be certified in class, that barges CBX-214 and CBX-207 were not certified in class and, therefore, that UMS is entitled to deny coverage on Duferco's claim for insurance. It is well established a breach of warranty contained in an insurance policy allows the insurer to avoid the contract of insurance. Thomas J. Schoenbaum, Admiralty and Maritime Law, §19-8, p. 424, (2nd ed. 1994) (hereinafter "Schoenbaum"). A "warranty" is a condition in the contract whereby the assured represents that something will or will not be done or states a condition to be fulfilled. Id. The terms of the warranty requires exact compliance. Id.

The warranty relates to "transports in relation to the marine voyage." The Court concludes that Article 4 does not apply to river barge transports. Other provisions of the UMS policy distinguish between a "marine journey" and a "journey on internal waters" and specifically refer to "river lighters." See, e.g., UMS Policy General Conditions, Article 11, and UMS Policy Special Agreements, Article 6. Such examples imply that a "marine voyage" does not refer to transport on "inland waters" or "rivers." The UMS policy appears to distinguish between river and marine voyages and Article 4 only refers to marine voyages. For this reason the Court concludes that Article 4 does not apply to barge

carriers hired for inland river transport. Accordingly, the Court rejects UMS' denial of coverage on grounds that Duferco failed to comply with a warranty of the policy.

Third, UMS claims that the negotiation of the Certificate of Insurance by Duferco to A.K. Steel precludes any claim against UMS under Open Cargo Policy No. 1381/111. There is no merit to this defense. It is an undisputed fact that Duferco owned the steel slabs at the time of the accident and that A.K. Steel had purchased the slabs C.I.F. upon arrival in Cincinnati. The fact that A.K. Steel may have had in its possession a copy of the original Certificate of Insurance at the time of the accident is not important. Both Italian law experts testified that Duferco, not A.K. Steel, possessed the insurable interest in the steel slabs until title passed to A.K. Steel upon arrival of the cargo in Cincinnati. Title to the sunken cargo did not pass to A.K. Steel.

Both experts agreed that Duferco possessed title to the cargo, the insurable interest, and was the only party which could claim under the UMS policy. The fact that the original Certificate of Insurance may have been in the possession of A.K. Steel or its bank (for purposes of arranging financing of the sale of the cargo) is a ministerial detail which could have been cured in order to perfect a claim under the UMS policy, according to Professor Dani. According to the testimony of Lynn Riley, A.K. Steel merely wanted evidence that the cargo was insured by Duferco. It acknowledged that title to the steel did not pass to it until the steel was off-loaded in Cincinnati. In sum, Duferco, not A.K. Steel, was the proper party to claim against UMS and the Court rejects UMS'

third coverage defense as unfounded.

Fourth, UMS claims that Duferco failed to safeguard UMS' rights against third parties when it signed the Assignment and Subrogation Receipt in favor of plaintiffs as required under Article 10(g) of the UMS policy, which provides:

"In the event of a loss the contracting party and/or insured must:"

"(e) perform, taking account of the legal and contractual periods, all acts necessary to protect the rights of recourse against any person responsible."

The Assignment and Subrogation Receipt executed by Duferco in plaintiffs' favor includes rights against Canal Barge, rights which plaintiffs are precluded from obtaining as a matter of law (i.e., plaintiffs cannot subrogate against their own assured, Canal Barge). UMS cites authority to the effect that insurers may deny coverage for failure of the insured to safeguard their right against third parties. See O'May on Marine Insurance Law (1993), at pp. 488-489. UMS asserts "this rule is especially pertinent in cases (such as this one) which involve loss of cargo, since relatively short time limits for commencement of suits against carriers apply." Id. The Court concludes that this rule is particularly inapplicable to this case and that Duferco did not sacrifice its rights under the policy by its failure to "safeguard" the rights of UMS against Canal Barge. UMS denied coverage prior to execution of the Assignment and Subrogation Receipt, at which time the foreseeability of settlement with plaintiffs was foreseeable to all parties involved.

As a prudent uninsured, Duferco could not reasonably have been expected to independently pursue an expensive and perhaps unfounded suit against Canal Barge. Moreover, UMS could have itself preserved its rights against Canal Barge as both UMS and Canal Barge were named parties in plaintiffs' action for declaratory judgment litigation as early as June 10, 1994, prior to the date of abandonment of the cargo by Duferco to plaintiffs and the negotiation of the Assignment and Subrogation Receipt.

UMS eventually did assert a cross claim against Canal Barge, alleging that the cargo loss was caused by the unseaworthiness of the barges owned by Canal, Canal's negligence and/or its breach of bailment obligations. The Court dismissed UMS' cross claim against Canal Barge as time-barred pursuant to §1303(6) of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. 1303(6), which provides a one-year limitations period in which to bring cargo claims. COGSA §1303(6) provides:

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

Thus, UMS itself failed to perfect any claim against Canal Barge, not Duferco. The Court concludes that the defense based on Article 10(e) of the UMS policy lacks merit and does not provide a basis for denial of coverage under the UMS policy.

Finally, UMS claimed that Duferco failed to get written

consent from UMS prior to payment by plaintiffs as required under Article 10(g) of the UMS policy, which provides:

"In the event of a loss, the contracting party and/or insured must:"

"(g) ... refrain from entering into arrangements and/or receiving any indemnity whatsoever without the prior written consent of the insurer."

According to Professor Dani, once UMS denied coverage under the policy, Duferco had a duty with respect to UMS to act as a prudent uninsured. UMS was fully aware that Duferco would seek recovery from plaintiffs. There is no reason to believe that this provision applied with equal force after UMS denied coverage and Duferco sought recovery under plaintiffs' policy.

The Court's admiralty jurisdiction includes jurisdiction to determine title to the salvaged steel, 28 U.S.C. 1331; California v. Deep Sea Research, Inc., 118 S.Ct. 1464, 66 U.S.L.W. 4286 (April 22, 1998) (holding that the Eleventh Amendment does not bar the admiralty jurisdiction of a federal court over the property that is not within the state's possession). The Fifth Circuit "has repeatedly given fullest play to the concept that admiralty jurisdiction embraces the resources of equity whenever the need arises." See Custom Fuel Serv. v. Lombas Industries, Inc., 805 F.2d 561, 566 (5th Cir. 1986).

The law of salvage applies to this case rather than the law of finds. Application of the law of finds, which vests

title in the subject res to the finder, is reserved for those rare cases where the owner is deemed to have abandoned his claim of title to the res. See Falgout Bros., Inc. v. S/V Pangaea, 966 F.Supp. 1143, 1145, (S.D. Ala. 1997), citing Schoenbaum, Admiralty and Maritime Law 798 (1987) . A finder must show by clear and convincing evidence that the owner voluntarily intended to divest himself of title. Id. Admiralty law favors the law of salvage over the law of finds because salvage law's aims, assumptions and rules are more consonant with the needs of marine activity. See Benedict on Admiralty, 158, 11-16, (citations omitted).

Salvage law specifies the circumstances under which a party may be said to have acquired not title but the right to take possession of property (e.g., vessels, equipment and cargo) for the purpose of saving it from destruction, damage or loss, and to retain it until proper compensation has been paid. Id. Salvage law assumes that the property being salved is owned by another and thus assumes that it has not been abandoned. Id. Even sunken cargo and vessels are in general deemed "abandoned" in admiralty only in the sense that the owner has lost the power to prevent salvage; a finding that title to such property has been abandoned requires strong proof, such as the owner's express declaration abandoning title. Id.

A.K. Steel's claim for salvage lien, to the extent that it had one, is time-barred. It is well established that a claim to enforce salvage rights must be brought within two years after the services of salvage are completed. See 46 U.S.C. 730; cf. Schoenbaum, §16-5. In this case American Eagle completed salvage of the steel slabs at issue on April 26,

1994. Plaintiffs added defendants American Eagle and A.K. Steel on August 15, 1995, alleging title to the salvaged steel. In its answer, American Eagle asserted that it lawfully salvaged the steel as a defense to liability but did not file a salvage lien. In its answer, A.K. Steel did not assert its salvage rights, but filed a cross claim seeking to quiet title to the steel. A.K. Steel amended its answer and counterclaim seeking a salvage award on December 24, 1997, more than two years after completion of the salvage.

A.K. Steel contends that its counterclaim for salvage relates back to its original action to quiet title to the salvaged steel pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, which provides that an amended pleading shall relate back. Federal R. Civ. Proc. 15(c). The fact that the Court permitted A.K. Steel to assert its claim for salvage in December 1997 does not bear on whether the claim is time-barred or relates back under Rule 15(c). Under Rule 15(c) an amendment to a complaint will relate back to the date of the original complaint if the claim asserted in the amended pleadings arises "out of the same conduct, transaction or occurrence set forth or attempted to he set forth in the original pleadings." Rule 15(c)(2).

Plaintiffs claimed against A.K. Steel to quiet title to the salvaged cargo. In bringing its counterclaim, A.K. Steel is not merely correcting a technicality or amplifying facts previously alleged. See FDIC v. Conner, 20 F.3d 1376, 1384, (5th Cir. 1994). Rather, A.K. Steel added an affirmative counterclaim for salvage lien and bonus. See Basic Boats, Inc. v. United States, 311 F.Supp. 597, 597 (E.D. Va. 1970) (distinguishing addition of counterclaim from Rule 15(c)

amendments). This Court concludes that A.K. Steel's affirmative claim for salvage lien filed on December 24, 1997, is time-barred.

A.K. Steel and American Eagle are entitled to assert a salvage lien as an affirmative defense and a basis for recoupment. See id. ("[T]here is ample authority to the effect that the counterclaim should be treated as an affirmative defense by way of recoupment, and this is true even though as an affirmative cause of action it may be barred by limitation.") This conclusion conforms with the goals promoted in salvage law and further prevents any unjust enrichment to plaintiffs.

The Court concludes that plaintiffs have title to the salvaged steel. The Court found that Duferco abandoned the steel to plaintiffs, who rejected the abandonment initially, but subsequently obtained title to the steel slabs on February 1, 1995 pursuant to the Assignment and Subrogation Receipt. Though plaintiffs did not assert title to the sunken cargo, they had title to it and there is no "clear and convincing" proof presented at trial that plaintiffs expressly abandoned title to the sunken cargo. Thus, the Court applies the law of salvage rather than the law of finds. The conclusion that plaintiffs possessed title to the cargo, whether sunken or salvaged, results in the corollary conclusion that A.K. Steel does not possess title to the salvaged steel which it purchased from American Eagle.

The Court concludes that A.K. Steel has no claim or defense pursuant the "voidable title doctrine" against American Eagle. The Court found, based on the testimony of

Doug Adams and Lynn Riley, that American Eagle did not warrant title to A.K. Steel. The purchase order of March 8, 1995, executed by A.K. Steel and American Eagle speaks for itself. The purchase order indicates (1) that American Eagle sold its "possession in salvage and title rights, if any"; and (2) that American Eagle warrants that the "slabs have been abandoned for salvage by the owners/underwriters." American Eagle attached two documents to the purchase order in support of "ownership and abandonment of the slabs"; these two documents were the salvage contract taken out by ICA on behalf of Duferco and the July 6, 1994 letter from ICA cancelling the contract. A.K. Steel Exhibit 14.

Pursuant to the purchase order, American Eagle sold its possession and salvage interests to A.K. Steel and only warranted documentation of abandonment by owners to underwriters. American Eagle neither possessed nor transferred nor warranted title to the salvaged slabs to A.K. Steel. Accordingly, the voidable title doctrine contained in the Uniform Commercial Code and Ohio law has no application here as this doctrine presupposes transfer of title by the seller. See Ohio Rev. Code §1302.44(A). §1302.44(A) provides:

"A purchaser of goods acquires all title which his transfer error had or had power to transfer ... A person with voidable title has power to transfer a good title to a good-faith purchaser for value." Id. Since American Eagle did not purport to transfer title of any kind, the Court finds the above provision inapplicable to the facts of this case.

American Eagle possessed a valid salvage lien. Plaintiffs argue that the law of salvage applies here. Plaintiffs

do not challenge any elements of American Eagle's salvage claim. The elements necessary to establish a salvage claim are: (1) a maritime peril to the property; (2) voluntary service by the salvor; and (3) the salvage effort must be successful in whole or in part. See Thomas J. Schoenbaum, Admiralty and Maritime Law, §16-7, at 324 (1994) ("Schoenbaum"); Falgout Bros., 966 F. Supp at 1145, citing, e.g., The Sabine, 101 U.S. 384 (1879).

Rather, plaintiffs contend that neither American Eagle nor A.K. Steel acted "in good faith. They had notice of plaintiffs' ownership. Their bad faith forfeits any award they may have been entitled to." Specifically, plaintiffs contend: (1) that American Eagle salvaged the steel in had faith because it should have returned the property to plaintiffs; and (2) that A.K. Steel purchased the steel in bad faith from American Eagle. Though a salvor acting in bad faith or without consent of the owner is not entitled to a salvage award, the Court found no bad faith on the part of American Eagle in salvaging the steel. See Jackson Marine Corporation v. Blue Fox, 845 F.2d 1307, 1309; Schoenbaum, §16-4 at 329. Finally, plaintiffs did not preserve a claim for negligent salvage in the Pretrial Order and there was no proof offered by plaintiffs in support of such claim for negligence. See Pretrial Order, p. 47.

The Court's findings on the salvage, supported by the testimony of Doug Adams and J. Kenneth Edgar, indicate that the successful salvage effort was undertaken in good faith. Likewise, there was no proof of bad faith on the part of A.K. Steel or American Eagle with respect to salvage, sale and purchase of the steel slabs.

American Eagle and A.K. Steel are entitled to recoupment of a salvage award for salvage of the steel slabs from the Mississippi River. The traditional criteria for an award are as follows:

(1) The time and labor expended by the salvor in rendering the salvage service;

(2) The promptitude, skill and energy displayed in rendering the service and saving the property;

(3) The value of the property risked or employed by the salvor and the degree of danger to which the property was exposed;

(4) The value of the property saved; and

(5) The degree of danger from which lives and property are rescued.

Schoenbaum, §16-5; cf. Falgout Bros., 966 F.2d at 1145. The salvage award may not exceed the value of the property saved. Schoenbaum, supra. The Court determines the value of the property saved according to appropriate recognized methods such as expert testimony. Id. Two aims underlie the provision of salvage awards: (1) just recompense for exemplary conduct; and (2) fostering economic efficiency.

The Court applies the factors to determine the salvage award in this case. As a starting point, American Eagle sold the salvaged steel to A.K. Steel for approximately $525,000.

The Court found that American Eagle sold its salvage rights to A.K. Steel; American Eagle did not subsequently perfect a salvage lien against plaintiffs. It is uncontested that American Eagle incurred expenses of $450,198.91 in salvaging the steel and earned a profit of $75,000. The Court found, based on the testimony of Adams and Edgar, that the salvage effort was risky, difficult and time-consuming, given the traffic at the location of the sunken barges, the depth of the cargo at the time of the salvage and prevailing conditions, including lack of visibility, sand coverage and decompression by salvage divers.

The salvage was successfully performed over a period of several months (from February to April 1995) and 30 slabs of sunken steel were not salvaged. In performing the salvage, American Eagle lost a tugboat. Edgar testified that cargo continues to sink. One of the reasons American Eagle salvaged the steel in early 1995 was that American Eagle was performing other salvage jobs nearby during that period. Had American Eagle not been mobilized on site to undertake salvage, i.e., had American Eagle mobilized its resources and equipment expressly for salvage of this cargo, its expenses would have been slightly higher. The Court, therefore, finds that American Eagle's salvage expenses were reasonable.

The Court found that the value of the salvaged cargo was approximately $716,400. In view of the value of the steel, the Court finds that a salvage award of $525,424.32 is an appropriate award in this case. The Court's award coincides with the price tag that American Eagle sought to recover for its services when it sold the steel and its salvage rights

to A.K. Steel, which fact confirms that it is reasonable remuneration given the conditions, expenses, risks and property value involved.

The Court concludes that plaintiffs have title to the salvaged steel. The Court further concludes that American Eagle and A.K. Steel are liable for negligent conversion of the steel because they exercised dominion or control over the steel by sale, purchase and consumption of the steel, which seriously and totally interfered with plaintiffs' right to control the steel. American Eagle kept one slab. It was never converted and is not included in the damage award. Thus, A.K. Steel and American Eagle are in solido liable to plaintiffs and UMS for the value of the 127 slabs of steel, but may recoup the salvage award against plaintiffs.

The Court finds for the reasons stated previously that the UMS policy provides and UMS is entitled to subrogate against A.K. Steel and American Eagle. An insurer has an equitable right of subrogation as a matter of law upon making payment for a cargo loss and retains its subrogation rights against parties responsible for same even after it litigates the issue of coverage. Ingersoll Mill. Mach. Co. v. M/V Bodena 829 F.2d 293, 308-309 (2nd Cir. 1987). Accordingly, plaintiffs and UMS are each entitled to claim their pro rata share of the damages levied against A.K. Steel and American Eagle. Plaintiffs are not entitled to recover attorneys fees as they have supplied no statutory or contractual support for same.

Finally, the Court concludes that there is coverage for negligent conversion under the general liability policy of

insurance issued to American Eagle by Britamco Underwriters, Inc. Britamco Underwriters, Inc. ("Britamco") issued a comprehensive general liability policy, No. KA0315, ("Britamco policy") to American Eagle effective during the period when American Eagle salvaged and sold the steel to A.K. Steel. Britamco maintains a position of no coverage for any liability on the part of its insured should American Eagle be liable, "intentionally depriving a third party of valid property rights." This policy is construed under Louisiana law. The Court concludes that the policy is unambiguous and can be enforced by its terms. Reynolds v. Select Properties, Ltd., 634 So.2d 1180, 1183 (La. 1994).

Britamco maintains that there is no coverage under the policy for the negligent conversion because the policy excluded "property damage expected or intended from the standpoint of the insured." Britamco's reliance on Red Ball Leasing v. Hartford Accident and Indemnity, 915 F.2d 306 (7th Cir. 1990) is misplaced. In that case the claimant "intended to deprive" another of its property and thus fit neatly into the exclusion of coverage for property damage that was "expected or intended." Here there was no evidence that American Eagle intended to deprive plaintiffs of their property.

American Eagle did not know that plaintiffs owned the steel. They took pains to avoid warranty of title and sold the steel, as well as their salvage rights, so as to avoid any future involvement in a title dispute. As stated earlier, American Eagle had possession of the letter stating that Duferco had abandoned any interest in the steel. Any conduct by American Eagle was negligent and is not included under the

Britamco policy. Therefore, the Court finds coverage under the Britamco policy.

The Court determined the value of the salvaged steel at the time of salvage was $716,400. The Court concluded that the salvage award is $525,424.32. Accordingly, A.K. Steel and American Eagle are in solido liable for $190,975.68; to plaintiffs in the amount of $38,195.13 and to UMS in the amount of $152,780.55. UMS is liable to plaintiffs in the amount of $789,081.93. All awards with interest and costs to be set forward in the judgment.

I will give you tomorrow a copy of this because we have made changes as we went along. We thought the parties in this case, even though they may well be disappointed, considering the length of time and the amount of money spent thus far, had a right to an expeditious decision so they can do with it what they might. With that, we will render judgment and judgment will be signed tomorrow. You can pick up an unsigned copy of this draft with the few little corrections that we have made.

MR. CARROLL: Your Honor, may I say for the record that on behalf of American Eagle we thank you for your attention. We thank you for the time you put into this case, particularly in rendering a judgment as quickly as you can.

MR. MINICLIER: And your patience during this long and protracted litigation, Your Honor.

THE COURT: At this time court is adjourned.

THE DEPUTY CLERK: All rise.

(WHEREUPON, the Court was in recess.

* * * * *

REPORTER'S CERTIFICATE

I, Toni Doyle Tusa, CCR, Official Court Reporter, United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

Toni Doyle Tusa
Toni Doyle Tusa, CCR
Official Court Reporter

July 28, 1998

Toni Doyle Tusa, CCR
501 Magazine Street, Room 406
New Orleans, Louisiana 70130

Courtenay, Forstall, Hunter & Fontana
730 Camp Street
New Orleans, Louisiana 70130

RE: USDC, EDL, 94-CV-1954-K
Adams, et al v. Unione Mediterranea De Sicurta, et al

For furnishing the original transcript of an excerpt from the proceedings of June 18, 1998, before the Honorable Stanwood R. Duval, Jr., United States District Judge presiding.

45 pages @ $3.00/page. $135.00

I CERTIFY THAT THE TRANSCRIPT FORMAT AND FEE COMPLY WITH THAT AS SET FORTH BY THE COURT AND THE U.S. JUDICIAL CONFERENCE.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 98-30875

U.S. COURT OF APPEALS
FILED
AUG 14 2000

STEVEN HENRY ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY LTD; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY LTD; MARITIME INSURANCE COMPANY LTD; THE NORTHERN ASSURANCE CO, LTD; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY; FOLKSAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD; SCOTTISH LION INSURANCE COMPANY LTD; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; DAI-TOKYO INSURANCE COMPANY (U.K.) LTD

Plaintiffs - Appellees - Appellants - Cross Appellants - Cross Appellees

VERSUS

UNIONE MEDITERRANEA DI SICURTA; ET AL
Defendants

AMERICAN EAGLE MARINE, INC
Defendant - Appellee - Appellant -
Cross Appellant - Cross Appellee

VERSUS

AK STEEL CORPORATION, formerly know as,
Armco Steel Company, LP
Defendant - Appellee - Cross Appellant

VERSUS

UMS GENERALI MARINE S.P.A., formerly known as Union Mediterranea Di Sicurta'

Defendant - Appellant - Cross Appellee

VERSUS

BRITAMCO UNDERWRITERS, INC
Defendant - Appellee - Appellant -
Cross Appellant - Cross Appellee

Appeals from the United States District Court
For the Eastern District of Louisiana

Before JONES, DUHÉ, and WIENER, Circuit Judges.

DUHÉ, Circuit Judge:

This appeal involves two causes of action arising out of the sinking of a cargo of 158 steel slabs in the Mississippi River. The first cause of action is a dispute between two insurers of the cargo, Steve Henry Adams, et. al. ("the Plaintiffs") and U.M.S. Generali Marine S.P.A. ("UMS"), over whether the non-paying coinsurer (UMS) should be required to contribute to the payment of loss. The second action is a claim by the Plaintiffs for conversion of the cargo against a voluntary salvor, American Eagle Marine, Inc. ("American Eagle") , and the subsequent purchaser of the salvaged cargo, A.K. Steel Corp. ("A.K. Steel").

Regarding the dispute between the insurers, we conclude that UMS did not waive its personal jurisdiction defense, and we reverse and remand for the district court to determine jurisdiction. We do not decide the other issues UMS and the Plaintiffs raise on appeal against each other. As to the conversion dispute, we affirm on all grounds except one. We reverse and vacate the district court's determination that American Eagle's general liability insurance policy with Britamco Underwriters, Inc. ("Britamco") provided coverage for American Eagle's negligent conversion. We do not decide whether UMS may subrogate against American Eagle and A.K. Steel.

BACKGROUND

I. Factual Background

While en route from New Orleans to Cincinnati,

Canal Barge Company ("Canal Barge") barges CBX 207 and 214 sank in the Mississippi River. This case involves a dispute over the 158 slabs of steel cargo carried to the riverbed aboard those two barges. A.K. Steel of Middletown, Ohio, had originally agreed to purchase the steel slabs from Duferco, S.A ("Duferco"), a Swiss Company.

The Plaintiffs and UMS concurrently insured the cargo under open marine cargo policies. Duferco had an open cargo policy with UMS, an Italian insurance company, which was written and issued in Italy and delivered to Duferco in Switzerland. Canal Barge had an open cargo/shippers' interest insurance policy with the Plaintiffs, on which Duferco was named as an additional insured.

After the accident, Duferco made a claim with UMS. Duferco, through its agent, the Italian Claims Agency ("ICA"), awarded a salvage contract to American Eagle to raise the cargo. The contract provided that it could be canceled with notice and that American Eagle did not have to perform salvage until the river gauge at Vicksburg fell below 20 feet, the depth at which salvage could be prudently performed. UMS advanced to Duferco $191,000 in sue-and-labor costs for the salvage effort. In March 1994, UMS denied the claim primarily because Duferco failed to warrant proper loading of the cargo. In the meantime, A.K. Steel (the original intended purchaser) confirmed that it did not own the cargo and assigned any and all of its rights to Duferco.

The salvage contract remained in effect until July 6, 1994, when ICA wrote American Eagle advising that

Duferco was canceling the contract. In the letter, an ICA representative wrote that the cargo "had been abandoned." The parties greatly dispute the meaning of this letter and the circumstances surrounding it. From July 6, 1994 until it mobilized its voluntary effort near the end of January 1995, American Eagle did not salvage the steel, although the river gauges suggested that the months of September, October and November of 1994, presented optimum times for salvage because of the low water depths. On February 18, 1995, with the river gauge just below the minimum depth for prudent operations, American Eagle voluntarily undertook salvage of the steel.

American Eagle did not negotiate with potential buyers for the steel before commencing the salvage operation. While it made some attempt to discover the chemical composition of the steel, it abandoned those efforts, thereby lowering the potential market value for the steel. American Eagle first contacted A.K. Steel on January 7, 1995. A.K. Steel offered to purchase what it described as the "Duferco Steel, that had sunk in the Mississippi." American Eagle was unaware that A.K. Steel was the original intended purchaser of the steel. A.K. Steel did not advise the Plaintiffs or other interested parties of its negotiations with American Eagle to purchase the steel.

In negotiations, American Eagle refused to warrant title to the steel as insisted by A.K. Steel. During the salvage operation, American Eagle also refused to sell the steel to another buyer because this purchaser demanded that American Eagle warrant title. Instead, it would only warrant abandonment for salvage, a demand to which A.K. Steel

eventually acceded. On March 8, 1995, American Eagle sold all its rights in the cargo retrieved to A.K. Steel. In the purchase agreement, American Eagle sold to A.K. Steel its "rights, and possession in salvage and title rights, if any."

Salvage operations commenced on February 21, 1995, and continued through April 26, 1995. American Eagle successfully salvaged 127 steel slabs, relinquishing them to A.K. Steel as they were placed aboard barges in the river. Pursuant to their contract, A.K. Steel paid American Eagle $525,424.32. The Plaintiffs did not assert an ownership interest in the steel until after the salvage operation was completed.

The Plaintiffs were made aware of the salvage operation in April 1995 by Canal Barge's counsel, who advised Plaintiffs, counsel that Douglas Adams of American Eagle had inquired about salvaging the cargo. When the Plaintiffs advised American Eagle and A.K. Steel that the cargo was theirs and that the salvage should cease, they both refused. American Eagle and A.K. Steel initially argued that they owned the steel. Later American Eagle and A.K. Steel asserted defenses based on the laws of salvage.

II. Procedural History

The Plaintiffs brought this case originally as an action for declaratory relief to ascertain the proper party to pay the constructive total loss of cargo under the insurance policy they issued to Canal Barge. They also sought to determined whether UMS, which also issued Duferco a

similar policy insuring the same cargo, was obligated to contribute to the payment. Plaintiffs named as defendants Ilva, the manufacturer of the steel; Duferco; Canal Barge; UMS; and Duferco Steel, Inc., an American sister company to Duferco. The court voluntarily dismissed Ilva, Duferco, Duferco Steel, Inc., Canal Barge and A. K. Steel from this initial action at various times. The Plaintiffs later made A.K. Steel a co-defendant in the action for conversion of the steel.

In the initial declaratory relief action, the district court held that Duferco was entitled to recover its loss from either Plaintiffs or UMS. Since Duferco made demands on the Plaintiffs first, the Plaintiffs were obliged to pay Duferco before seeking contribution from UMS. Pursuant to this ruling, the Plaintiffs paid Duferco $986,352.41 in exchange for an assignment of Duferco's rights, if any, against UMS. Plaintiffs refused Duferco's claim for payment of approximately $191,000 in sue and labor expenses (specifically, investigation expenses, survey costs, and attorney's fees) advanced by UMS during the preliminary loss investigation. The district court voluntarily dismissed A.K. Steel, which had relinquished any claim it may have had, from the suit prior to payment of the Duferco claim.

The Plaintiffs then discovered the salvage effort and demanded that American Eagle and A.K. Steel return the cargo or pay its value. When American Eagle and A.K. Steel refused, the Plaintiffs filed an amended declaratory judgment action, which asserted a claim to recover the value of the steel from American Eagle and A.K. Steel. UMS then filed a cross-claim against A.K. Steel and American Eagle.

At trial on the amended declaratory action, it was determined that although UMS had initially agreed to pay Duferco's claim, UMS denied coverage after learning Canal Barge had additional coverage. The district court rejected every coverage defense raised by UMS.[1] In rejecting these defenses, the district court found that UMS was obliged under its policy with Duferco to contribute to the loss in proportion to the amount its coverage bore to the total amount of insurance (80 percent of the loss) . The district court awarded the Plaintiffs $789,081.93 against UMS or 80 percent of $986,352.41.

In the conversion action, the district court found that American Eagle and A.K. Steel had, albeit in good faith, negligently converted the steel.[2] The court held that the Plaintiffs had not abandoned the cargo. The court awarded $190,975.68 for the conversion, which it divided on an eighty-twenty basis between UMS ($152,780.55) and Plaintiffs ($38,195.13). The district court entered judgment against American Eagle and A. K. Steel in favor of UMS and the Plaintiffs for these amounts. Finally, the court held that American Eagle's liability for negligent conversion was covered by its general liability insurance policy

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[1] The district court earlier had granted the Plaintiffs' motion to compel substitution of real party in interest. This motion requested the district court to make UMS an involuntary Plaintiff in Duferco's cross-claim against Canal Barge.

[2] The district court and the parties treat both American Eagle and A.K. Steel as salvors. For this reason, we likewise do so in certain portions of our opinion.

with Britamco.[3]

In calculating the judgment, the district court determined that the cargo's value, after applying a 20 percent discount based on the unavailability of the steel's chemistries to Plaintiffs, was $716,400.[4] The court then offset the value of the sunken steel by $525,424.32, American Eagle's salvage expenses. The district court held that American Eagle's and A.K. Steel's right to assert a salvage claim against the Plaintiffs had lapsed with the passage of the two-year prescriptive period, but the right could nonetheless be asserted as an affirmative defense. The $190,975.68 is then the difference between the discounted value of the cargo and the salvage expense.

No party is happy with the district court rulings. On appeal, UMS has dropped all coverage defenses. UMS appeals the district court rulings concerning personal jurisdiction over it, venue, and the allocation of the loss between insurers. The Plaintiffs contend that UMS should be barred from receiving any money judgment from A.K. Steel and American Eagle until it pays them its pro- rata share of the constructive loss. Plaintiffs also argue that the district court abused its discretion in not allowing them to recover attorney's fees and expenses from UMS.

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[3] During the course of this litigation, American Eagle filed for bankruptcy. The court then ordered an automatic stay. The court lifted the stay and substituted Britamco as the real party in interest.

[4] The district court reached this amount by reducing the per net ton of the steel from $300 to $240 and then presumably multiplying that figure by the tonnage of the salvaged steel.

Regarding the conversion litigation, American Eagle and A.K. Steel appeal the district court's finding of negligent conversion, arguing that the cargo was abandoned. American Eagle also appeals the district court's ruling on negligent conversion, arguing that it only transferred its possessory interest and salvage claim to A.K. Steel. In addition, A.K. Steel appeals the district court's holdings that it was not protected by the voidable title doctrine, that UMS could subrogate against it, and the court's exercise of subject matter jurisdiction. Plaintiffs cross-appeal the district court's ruling that American Eagle and A.K. Steel could assert the right to a salvage claim as an affirmative defense, its ruling that they acted in good faith, and its calculating the steel's value and the salvage award. Finally, American Eagle's insurer, Britamco, alleges that the district court erred in concluding that its-policy covered American Eagle's negligent conversion.

DISCUSSION

I. Personal Jurisdiction over UMS

We review de novo the district court's determination that its exercise of personal jurisdiction over a non-resident defendant is proper when the relevant facts are not in dispute. Wilson v. Belin, 20 F.3d 644, 647-48 (5th Cir. 1994). When a nonresident defendant timely questions a federal district court's jurisdiction over it, the plaintiff bears the burden of establishing jurisdiction. Id. at 648; Travelers Indem. Co. v. Calvert Fire Ins. Co., 798 F.2d 826, 831 (5th Cir. 1986). In determining personal jurisdiction, a court is not restricted to a review of the plaintiff's pleadings. It may

resolve a jurisdictional issue by receiving affidavits, interrogatories, depositions, oral testimony, or any recognized form of discovery. Jobe v. ATR Marketing, Inc., 87 F.3d 751, 753 (5th Cir. 1996).

In admiralty cases, a federal court may exercise personal jurisdiction over a foreign defendant, such as UMS, when (1) Louisiana could have acquired personal jurisdiction over the defendant on the same cause of action; and (2) the exercise of jurisdiction comports with the Due Process Clause of the Fourteenth Amendment. Asarco, Inc. v. Glenara, Ltd., 912 F.2d 784, 786 (5th Cir. 1990). In this case, these two inquiries merge into one because Louisiana's long-arm statute permits jurisdiction coterminous with the scope of the Due Process Clause. Id. See La. Rev. Stat. Ann. § 13:3201 (West 1991).

Additionally, a defendant may waive its personal jurisdiction defense, thereby consenting to jurisdiction. See Travelers Indem. Co., 798 F.2d at 834. ("Clearly parties can waive lack of personal jurisdiction."). Usually a party waives personal jurisdiction by failing to raise the issue when filing a responsive pleading or making a general appearance. Fed R. Civ. P. 12 (h) . In rarer circumstances, a defendant may waive personal jurisdiction if it authorized another to appear or act on its behalf in court. Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110, 1121 (6th Cir. 1994) (citing Federal Deposit Ins. Corp. v. Oaklawn Apts. 959 F.2d 170, 175 (10th Cir. 1992)).

The district court concluded that UMS waived

personal jurisdiction because it authorized Duferco to appear on its behalf.[5] The court first determined that the legal representations of UMS and Duferco were intimately intertwined. The court examined Statements for Professional Services Rendered submitted by various law firms involved in this litigation. The court found that those documents indicated that at the time Duferco filed its answer to the Plaintiffs' complaint, the same attorneys represented UMS and Duferco. In addition, UMS paid Dufercols legal bills during 1994 and 1995; and a law firm representing Duferco had represented UMS on other occasions.

The Court also concluded that not only was the legal representation intertwined, but the claims were as well:

> UMS' attempt to shield itself from the jurisdiction of this court by relying on Dufercols ostensible obligation to reimburse them is disingenuous, at best. Indeed, UMS continually argues that Duferco must reimburse them for the fees expended during the salvage attempt. However, Duferco has paid UMS nothing despite that the loss occurred over two years ago. Nor has the Court been given any proof that UMS has instituted suit against Duferco in Italy for this money.

The court found that UMS attempted to insulate itself from the court's jurisdiction by hiding behind Duferco. "Duferco is truly acting for UMS. Thus, this Court finds that UMS has

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[5] The court denied UMS' motion to dismiss for lack of jurisdiction and later denied UMS' motion to reconsider and order seeking certification pursuant to 28 U.S.C. § 1292(b). The court denied UMS, motion to reconsider for the same reasons stated in its earlier order.

waived its personal jurisdiction defense through the actions of Duferco." Citing Reynolds, 23 F.3d at 1121. Because of this finding, it was unnecessary for the court to consider whether it had specific or general personal jurisdiction over UMS.

On appeal, UMS raises some legitimate questions regarding the district court's findings regarding the relationship between UMS and Duferco. As to the court's determination that UMS had not sought reimbursement for the sue-and-labor costs from Duferco for nearly two years, UMS contends that such action was not necessary because UMS already had a less formal but equally effective means to enforce Dufercols obligation to pay. A Duferco director testified in a deposition that on July 3, 1995 UMS entered a debit of $191,000 on Dufercols open account.[6] (R. at 3689-3691) . This amount was subtracted from a total premium refund of $574,342, which was paid to Duferco when the accounting for the 1993-1994 policy year was completed. (See UMS Bench Book of Exhibits 16).

UMS also claims that the District Court misapplied Reynolds in holding that UMS authorized Duferco's actions. In Reynolds, the Sixth Circuit reversed the lower court's holding that the International Amateur Athletic Federation ("IAAF") had waived its jurisdictional defenses by reason of a Federation member's intervention in a lawsuit filed against the IAAF by a disgruntled athlete. The Sixth Circuit

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[6] The Plaintiffs contend that this deposition only reinforces the district court conclusion. The director testified that he did not regard the expenses to be owed by Duferco. Instead, he expected full recovery of its losses and expenses from UMS.

determined that the member was carrying out a statutory duty when it intervened, and noted that there was no evidence indicating the IAAF authorized the member to do so. Reynolds, 23 F.3d at 1121. To some extent, this case is similar to Reynolds. Duferco had an obligation under Italian law to reimburse the expenses to UMS. Italian Civil Code, Article 2041 (Mario Betramo, et. al., trans.) (1991) ("General cause of action for unjust enrichment. A person who has enriched himself without cause at the expense of another shall, to the extent of the enrichment, indemnify the other for his correlative financial loss.")[7]

UMS makes a strong showing that it has been reimbursed, but we are still left with undisputed evidence that the legal representations of UMS and Duferco were intimately intertwined. UMS contends that even this evidence does not amount to consent to personal jurisdiction.

Cases dealing with this factual scenario are few and far between. Travelers Indem. Co., 798 F.2d at 832-35, involved a dispute over defendant insurer London Club's indemnity obligations arising from a maritime collision. In the suit, counsel selected by London Club had consented, on behalf of the shipowner, to transfer the case to Louisiana. The Plaintiffs argued that this consent amounted to a waiver of London Club's personal jurisdiction defenses in federal court in Louisiana. We held that the consent to transfer did not result in London Club's waiver of its personal jurisdiction defenses. Id.

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[7] Plaintiffs contend that this argument rings hollow in light of UMS' failure for nearly two years to attempt to recover the expenses from Duferco in an Italian forum.

One federal district court has rejected the contention that a foreign defendant waives jurisdiction when it has a controlling interest in ongoing litigation in the United States. Complaint of Kreta Shipping, S.A., No. 96 Civ. 1137, 1998 WL 173167 (S.D.N.Y. Jan. 29, 1998), arose out of the abandonment of the M/V AMPHION, which resulted in damage to a cargo of steel laden on board. Kreta, the owner of the vessel, commenced a limitation action in federal court seeking exoneration from or limitation of liability with respect to losses connected with the AMPHION's voyage.

Kreta had hired Astron Maritime Company to provide management services for the vessel in accordance with a standard managing and agency agreement, which was signed and negotiated in Greece. Claimants in the limitation proceeding filed actions in federal court against Astron, which sought to dismiss these claims for lack of personal jurisdiction. The claimants did not contend that any of the facts presented to the district court subjected Astron to personal jurisdiction. Rather, they took the position that jurisdiction came from Astron's conduct in the Kreta Shipping litigation. They specifically alleged that Astron, rather than Kreta, made the decision to file the limitation action and had "power over litigation conferred by the ship management contract." Id. at *3.

The district court rejected this theory and concluded that Astron did not consent to personal jurisdiction through its involvement in the Kreta Shipping litigation.

> The fact that Astron may be the party ultimately liable and that Astron may have directed the decision-making

> behind this lawsuit does not result in Astron having consented to the Court's jurisdiction. These facts make Astron no different than the typical maritime (or other) insurer - an insurer will often be the party ultimately financially liable, may provide for the insured's legal representation and legal strategy, and often effectively controls the conduct of the lawsuit. Insurers do not, however, consent to personal jurisdiction through such activities (absent state "direct action" or similar insurance legislation).[8]

The district court's reasoning in Kreta shipping is compelling; in particular the court's recognition that insurers often must take an active role in an insured's legal problems.[9] UMS has continually argued that it is accepted industry custom world-wide for an insurer to retain the same attorneys to act for itself and its insured when investigating loss. While UMS, actions may be somewhat suspect, the evidence does not support a finding that UMS has relied on these tactics to insulate itself from jurisdiction of the district court. The evidence equally supports a finding that UMS acted like any other insurer would when its insured faces legal liability. In addition, our standard of review places the

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[8] Id. at *7 (internal citations omitted). The direct action statute in Louisiana is not a legislative assertion of jurisdiction over insurance companies. McKeithen v. M/T FROSTA, 435 F. Supp. 584, 586 n.6 (E.D. La. 1977).

[9] The Plaintiffs argue that the factual circumstances in Kreta Shipping are critically different from those in this case because the shipping agent in Kreta Shipping was not attempting to assert a cause of action for funds owed to the agent. Whereas, UMS was asserting its claim disguised as Duferco. The Plaintiffs, however, do not dispute the central holding of Kreta Shipping. Moreover, based on the analysis above, it is impossible to discern what motives, if any, UMS had as to the funds in question.

burden on the plaintiff, and not the defendant, to support finding personal jurisdiction. See also C. Wright & A. Miller, Federal Practice and Procedure § 3522 at 60 (1984) ("It is a principle-of first importance that the federal courts are courts of limited jurisdiction.").

For these reasons, we conclude that UMS did not waive its personal jurisdiction defenses and we reverse the district court. Because of its decision on waiver, the district court did not decide whether it had specific or general jurisdiction over UMS.[10] Since the parties dispute whether the district court has jurisdiction over UMS, we remand the case for a further determination of jurisdiction. Because jurisdiction over UMS is unresolved, we do not address the other issues the Plaintiffs and UMS raise on appeal: The Plaintiffs claim attempting to block UMS from receiving its money judgment and their claim seeking attorney's fees and expenses from UMS; and UMS claims of improper venue and improper allocation of loss between insurers. We also do not address whether UMS may subrogate against American Eagle and A.K. Steel.

II. Salvage and Title Dispute

A. Abandonment of the Cargo

We review findings of fact for clear error and legal conclusions de novo. Ivy v. Jones, 192 F.3d 514, 516 (5th

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[10] The parties submitted motions to the court addressing the personal jurisdiction/minimal contacts inquiry and the district court conducted a hearing, but ruled only on the waiver issue.

Cir. 1999). Under the clearly erroneous standard, we look first to whether there is substantial evidence supporting the findings. We will not set aside the district court's factual findings when they are supported by substantial evidence, unless, after a review of the record as a whole, we are left with the unyielding belief that a mistake has been made. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985).

The district court held that the Plaintiffs had title to the salvaged steel. The court determined that the law of salvage applied to this case, rather than the law of finds. Therefore, A.K. Steel did not possess title to the salvaged steel, which it acquired from American Eagle. On appeal, American Eagle and A.K. Steel contend that title to the cargo was abandoned pursuant to the law of finds, therefore, American Eagle and subsequently A.K. Steel should be considered the rightful titleholders.

We review whether the sunken cargo comes within the law of salvage or the law of finds.[11] One commentator has noted that "[t]here appears to be no clear line of

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[11] A.K. Steel argues that the trial court incorrectly determined that it had admiralty jurisdiction over the title issue and state law should apply because the steel slabs were abandoned and embedded in the river bed. It contends that this case does not come within the jurisdiction of federal courts under the Abandoned Shipwrecks Act. In California v. Deep Sea Research Inc., 118 S.Ct. 1464, 1473 (1998), the Supreme Court held that the Eleventh Amendment does not bar federal jurisdiction to adjudicate the status of a wreck under the Abandoned Shipwrecks Act, 43 U.S.C. §§2101-2106. In addition, the Abandoned Shipwrecks Act does not govern this case. As a rule, claims arising out of salvage operations are within the admiralty jurisdiction of federal courts. Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 566 (5th Cir. 1981).

demarcation between property that is 'salvaged' and 'finds.'" Frank L. Maraist, Admiralty in a Nut Shell 130 (West 3d ed. 1996). Generally speaking, "[m]arine salvage occurs when marine property is successfully saved by a volunteer from marine peril. By performing a voluntary and successful act, the salvor obtains a maritime lien on the salved property, which he can enforce in rem in an admiralty court." Martin J. Norris, Benedict on Admiralty § 802[A] at 8-4 (1998).

The owner of the distressed goods on navigable waters does not lose title even though the property may become the subject of salvage services. Id. § 150 at 11-1.[12] "The salvor obtains a right of possession; he does not acquire ownership or title to the salved property." Id. § 150 at 11-1 to 11-2. The maritime lien allows the salvor to secure compensation for his voluntary services. "All that the salvor can do is to enforce his lien by making his claim to an award. He thus has a lien and he has the right of possession. He also has the duty of properly caring for the property while it is in his possession." Id. at 11-2.

A find, on the other hand, differs from salvage in that the property has either been abandoned (as further defined below) or never owned by any person. The property belongs to the finder.

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12 "When articles are lost at sea the title of the owner in them remains, even if they are found floating on the surface or after being cast upon the shore. Should a vessel be abandoned without hope of recovery or return, the right of property still remains in her owner." Benedict on Admiralty 150 at 11-1

Benedict on Admiralty notes:

> The common law of finds treats property that is abandoned as returned to the state of nature and thus equivalent to property, such as fish or ocean plants, with no prior owner.
> . . . . Admiralty favors the law of salvage over the law of finds because salvage law's aims, assumptions, and rules are more consonant with the needs of maritime activity and because salvage law encourages less competitive and secretive forms of conduct than finds law . . . . [A] finding that title to such property has been lost requires strong proof, *such as the owner's express declaration abandoning title.*" Id. § 158 at 11-16 (quoting Hener v United States, 525 F. Supp. 350 (S. D. N. Y. 1981) (emphasis added)).

Several courts favor salvage instead of finds, and have applied the law of finds only when supported by strong evidence. The Fifth Circuit has noted that even when a vessel is abandoned the original owner is not divested of title "except in extraordinary cases . . . where the property has been lost or abandoned for a very long period." Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 567 (5th Cir. 1981).

The more important question, however, is what must an owner do to affirmatively release title to the.property - forever abandoning it under the law of finds. As the Fourth Circuit has noted there are only a handful of cases applying the law of finds. These cases fit into two categories. "First, there are cases where owners have expressly and publically abandoned their property. In the second type of case, items

are recovered from ancient shipwrecks and no owner appears in court to claim them." Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., 974 F. 2d 450, 461 (4th Cir. 1992) (internal citations omitted) In the first context, a party may show abandonment only by a clear and unmistakable affirmative act indicating a purpose to repudiate ownership. Id. A federal district court has said that abandonment under the law of finds must be proven by "*clear and convincing evidence*," such as the owner's express declaration abandoning title. Falgout Brothers, Inc. v. S/V Pangaea, 966 F. Supp. 1143, 1145 (S.D. Ala. 1997) (citing Columbus-America Discovery Group, 974 F.2d at 461) (emphasis added).

Therefore, we must apply the law of salvage unless American Eagle and A.K. Steel demonstrate through clear and convincing evidence that the owner of the steel, Duferco or later the Plaintiffs, made an. express declaration abandoning title. We now review the pertinent facts.

On July 6, 1994, ICA Representative Victor Bruzzone (Dufercols agent) wrote a letter to American Eagle stating, "[w]ith reference to the aforementioned salvage contract and in conformity with paragraph 6, we are instructed by Duferco, S.A., to cancel said contract of salvage as cargo has been abandoned." Duferco then sent a letter on July 28, 1994 to Canal Barge saying:

> We hereby advise you and your cargo underwriters that the 'steel slabs' in question have been abandoned by us. It has been our understanding for some time that you and representatives of your cargo underwriters were aware that the salvage of the cargo in question was impossible

> due to river conditions, and that the cost of possible salvage operations would exceed the possible market value for the steel commodity in question. We immediately request that you put your cargo underwriters on formal notice of our abandonment of the cargo.

Both sides dispute the meaning of these letters. Bruzzone testified that he was instructed to cancel the salvage contract so that Duferco could declare the cargo a constructive total loss. Bruzzone said that Duferco had not told him they were "abandoning" the cargo; rather Bruzzone picked up the term "abandon" from a Duferco attorney. Bruzzone claimed the purpose of the letter was to cancel the salvage contract. American Eagle contends that Plaintiffs, witness Michael Garin testified that the Plaintiffs considered Duferco's abandonment to be a total abandonment to the world, and the Plaintiffs had no intent of salvaging the cargo or asserting ownership until it did so in April 1995.

Based on the above letters the district court concluded that Duferco had abandoned the cargo on July 28, 1994. The Plaintiffs refused to accept the abandonment in August 1994. Then, in response to the court's declaratory judgment, ruling, the Plaintiffs made a partial payment to Duferco in the amount of $986,352.41 in exchange for an assignment of Duferco's rights, if any, against UMS. On February 1, 1995, Plaintiffs and Duferco executed an Assignment and Subrogation Receipt in return for payment on the claim. The Assignment and Subrogation Receipt provided that, "[the Plaintiffs] are entitled at [their] option to take over [Dufercols] interest in whatever may remain of goods, it being understood that delivery to [the Plaintiffs] of the document of title relating to goods shall not be construed

as an exercise of such option."

Based on this agreement, the court concluded that Plaintiffs had title to the steel. It held that, even though the Plaintiffs initially rejected the abandonment, they subsequently obtained title to the cargo pursuant to the Assignment and Subrogation Receipt. The court found that there was no "clear and convincing" proof presented at trial that the Plaintiffs expressly abandoned title.

On appeal, American Eagle and A.K. Steel focus on the district court's finding that the Assignment and Subrogation Receipt transferred title to the Plaintiffs. A.K. Steel argues that because Duferco abandoned the steel in July 1994 it no longer had ownership rights which it could transfer to the Plaintiffs on February 1, 1995.[13] Both A.K. Steel and American Eagle note that the Assignment only gave the Plaintiffs an option to take control of the sunken steel. However, the Plaintiffs did, not attempt to exercise the option until it learned of the salvage in late April 1995.

Even though the transfer of title from Duferco to the Plaintiffs is not entirely clear, we agree with the district court that there is no clear and convincing evidence that Duferco expressly abandoned title to the cargo before the Assignment to the Plaintiffs. The district court did not commit clear error in its factual findings that Duferco maintained

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[13] A.K. Steel notes that the Plaintiffs failure to accept the abandonment in August 1994 resulted in titled not passing to them. See Jones Towing, Inc. v. United States, 277 F. Supp. 839, 849 (E. D. La. 1967). Nevertheless, this argument does not defeat the presumption that Duferco retained title.

title to the cargo until the Plaintiffs entered into the Assignment and Subrogation Receipt with Duferco. We agree that A. K. Steel did not receive title to the steel slabs when it purchased the salvaged cargo from American Eagle.[14]

B. Conversion by American Eagle and A.K. Steel

The district court concluded that American Eagle and A. K. Steel were liable for negligent conversion of the cargo because they exercised control by sale, purchase and consumption of the steel. These acts totally interfered with the Plaintiffs, right to the steel. American Eagle argues that it should not be held liable for conversion because it had the right to transfer its possessory right and salvage interest to A.K. Steel. Again, we review the district court's findings of fact for clear error and legal conclusions de novo.

American Eagle correctly states that through a successful salvage effort it obtained a right of possession in the steel. To support this proposition, American Eagle suggests that "[o]ne so appropriating abandoned property, or any third person whom he may allow to take it, has a right to the property superior even to that of the former owner, and may hold it against him." Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F. Supp. 452, 456 (E.D. Va. 1960). American Eagle concludes that it had the right to transfer its possessory right and salvage interest to A.K. Steel, which it did on April 26, 1995.

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[14] We find no basis for A.K. Steel's claim that under choice of law rules the Plaintiffs, assertion of title should be governed by the laws of the United Kingdom.

The district court properly concluded that American Eagle and A.K. Steel committed negligent conversion. As already noted, the Plaintiffs maintained ownership and title over the steel under the law of salvage. The law of salvage prescribes how American Eagle must act as salvor of the Plaintiffs' steel. "Salvage law specifies the circumstances under which a party may be said to have acquired, not title, but the right to take possession of property (e.g., vessels, equipment, and cargo) for the purposes of saving it from destruction, damage, or loss, and to retain it until proper compensation has been paid." Columbus-America Discovery Group, 974 F.2d at 460 (quoting Benedict on Admiralty § 158 at 11-15 to 11-16.).

While American Eagle had a right of possession, it did not become the owner of the salved property by virtue of its services and could not transfer title to it. American Eagle "merely has a maritime lien granted by the general maritime law to ensure that [its] reward for saving property will be satisfied out of the property saved." Benedict on Admiralty § 157 at 11-13. Therefore, the district court's conclusion that American Eagle and A.K. Steel were liable for negligent conversion is correct. American Eagle and A.K. Steel had the duty to protect the salved property for the owner and the right to assert a claim against it for the cost of the salvage. [15]

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[15] American Eagle's citation to Wiggins, 186 F. Supp. at 456, is unpersuasive as that case concerned property whose owners had abandoned title. In this case, the court properly found that the cargo was only abandoned for salvage purposes.

C. Issues Raised by A.K. Steel on Appeal

1. Choice of law regarding the contract

A.K. Steel argues that the trial court erred by failing to perform an adequate choice of law analysis to determine what law should govern the contract between American Eagle and A.K. Steel. A.K. Steel asserts that Ohio law should govern because Louisiana conflicts of law analysis requires that a contractual choice of law provision be given effect unless there is statutory or jurisprudential law to the contrary. Delhomme Industries, Inc. v. Houston Beechcraft, Inc., 669 F.2d 1049, 1058 (5th Cir. 1982) (quoting Associated Press v. Toledo Investors, 389 So.2d 752, 754 (La. App. 3d Cir. 1980)). It contends that as a purchaser of salvaged goods, and not the salvor, maritime law should not apply.

We review choice of law questions de novo. Woodfield v. Bowman, 193 F.3d 354, 358 (5th Cir. 1999). Claims arising out of salvage operations are clearly within the admiralty jurisdiction of the federal courts. Treasure Salvors, Inc., 640 F.2d at 566. We have noted that "[d]isputes concerning the surveillance and sale of cargo are subject to being treated in admiralty." Coastal (Bermuda) Ltd. V. E.W. Saybolt & Co. Inc., 761 F.2d 198, 202 n.4 (5th Cir. 1985) Therefore, since the criteria for admiralty jurisdiction are met, we must apply federal admiralty and maritime laws and not state law.

2. Ohio Voidable Title Doctrine

A.K. Steel argues that the district court erred when it held that A.K. Steel had no claim or defense pursuant to the Ohio voidable title doctrine. However, because admiralty jurisdiction includes issues related to the sale of cargo, we apply federal admiralty law and not the Ohio voidable title doctrine in reviewing American Eagle's sale of the cargo to A.K. Steel.

Even if Ohio law did apply, A.K. Steel does not make a valid claim. The district court found that pursuant to a purchase order, American Eagle sold its possession and salvage interests to A.K. Steel and only warranted documentation of abandonment by owners to underwriters. The court said "American Eagle neither possessed nor transferred nor warranted title to the salvaged slabs to A.K. Steel."

The court then noted that the Ohio Voidable Title Doctrine could not apply in this case. The statute provides that: "A purchaser of goods acquires all title which his transferor had or had power to transfer . . . . A person with voidable title has power to transfer good title to a good faith purchaser for value." Ohio Rev. Code § 1302.44(A). Because American Eagle did not purport to transfer title of any kind, the court found the statute to be inapplicable.

We review the court's factual findings under a clearly erroneous standard and its legal conclusions de novo. American Eagle never had title to the salvaged steel. Therefore, it could neither transfer nor warrant title to A.K. Steel. In addition, American Eagle never purported to transfer title. American Eagle's agreement with A.K. Steel

transferred rights, interest, and possession of slabs retrieved to A.K. Steel, including "rights, and possession in salvage and title rights, if any." The agreement included a warranty which provided "that the slabs have been abandoned for salvage by the owners /underwriters." Under the terms of this agreement, A.K. Steel should have expected to possess the steel but not receive title to it. Therefore, we agree that the voidable title doctrine is inapplicable.

3. Breach of warranty

A.K. Steel next argues that American Eagle breached its expressed warranty with A.K. Steel. A.K. Steel says that American Eagle warranted that the owners /underwriters had abandoned title to the steel allowing it to transfer full title to A.K. Steel, when in fact the steel had only been abandoned for salvage, thus American Eagle could not transfer title. A. K. Steel contends that under Ohio law a purchaser that relies on the express warranty of a seller of goods and suffers injury may sue to recover damages for breach of express warranty. Plastic Moldings Corp. v. Park Sherman Co., 606 F.2d 117 (6th Cir. 1979). Again, because this issue involves the sale of marine cargo, we must apply federal admiralty law and not state law.

Even if state law did apply, we conclude that there was no breach of warranty. First, American Eagle stated in its purchase order that it was selling "possession in salvage and title rights, if any" and that the "slabs had been abandoned for salvage." In addition, American Eagle refused to sell the steel to a buyer that demanded warranty of title, even though that buyer offered to pay more for the steel. Because

American Eagle did not purport to transfer anything but the rights it had "if any," it likewise did not expressly warrant to A.K. Steel that it was transferring title. Moreover, A.K. Steel, as the original purchaser, knew that the steel belonged to Duferco. Therefore, American Eagle cannot be liable for breach of warranty.

D. Issues Raised by Plaintiffs on Appeal

1. The salvage claim

The Plaintiffs first argue that the district court erred in finding that American Eagle and A.K. Steel possessed a valid salvage claim. With this valid claim, the district court subsequently granted American Eagle and A.K. Steel an award for salvaging the steel slabs, which was offset by the conversion judgment. Plaintiffs contend that American Eagle and A.K. Steel performed neither of the requirements to establish the right to a claim. They neither filed for a salvage lien nor returned the cargo to the owners. Since they failed to preserve the right to a claim, the right never existed.

The Plaintiffs do not dispute the court's finding that an initial salvage claim existed. A salvage claim exists when there is: (1) a maritime peril to the property; (2) voluntary service by the salvor; and (3) the salvage effort is successful in whole or in part. Schoenbaum, Admiralty and Maritime Law § 16-1 at 324. However, Plaintiffs correctly point out that the two defendants failed to preserve the right to the salvage claim within the two-year statute of limitations period.

Although the statute of limitations period for filing a salvage claim had passed, the district court concluded that A.K. Steel and American Eagle were entitled to assert a salvage claim as an affirmative defense and as a basis for recoupment in response to Plaintiffs, claim to quiet title. Citing Basic Boats, Inc. v. United States, 311 F. Supp. 596, 597 (E.D. Va. 1970), the court noted that "there is ample authority to the effect that the counterclaim should be treated as an affirmative defense by way of recoupment, and this is true even though as an affirmative cause of action it may be barred by limitation."

Plaintiffs argue that the district court misapplied Basic Boats because in that case the U.S. Navy defended against a damage claim with the shield of an expired salvage claim because it preserved the salvage right by returning the vessel to its owners. American Eagle and A.K. Steel, however, did not return the salvaged property to its owners.

We conclude that the court did not err in relying on Basic Boats. Although the two defendants did not preserve a salvage claim in the traditional manner, they did properly assert such a right as an affirmative defense and recoupment to Plaintiffs' claims. We must now determine whether or not A.K. Steel and American Eagle should receive a salvage award for their efforts. This question turns on a determination whether or not they acted in good or bad faith during the salvage and subsequent transfer of the steel.

2. Did American Eagle and A.K. Steel act in good faith?

A salvor has an obligation to bring aided property to a safe place for the eventual return to the owner. A salvor may not keep the salved property and, if she did so, would become liable for conversion. Benedict on Admiralty § 157 at 11-13. Justice Story noted that "[i]n cases of salvage, the party founds himself upon a meritorious service, and upon the implied understanding, that he brings before the court, for its final award, all the property saved with the entire good faith; and he asks a compensation for the restitution of the uninjured, and unembezzled by him." The Boston, 3. F.Cas. 932, 937 (1833).

A salvor obviously will not receive an award if he loses the property or acts in bad faith. But it is not entirely clear what constitutes bad faith. Storey noted that embezzlement by salvors must be punished by forfeiture of the salvage claim. *Id.* More recently this Circuit has said that admiralty courts must be vigilant in protecting mariners from unscrupulous and dishonest salvors. "[T]he law cannot tolerate salvors [sic] dishonesty, corruption, fraud, falsehood, either in rendering service, or in their proceedings to recover the salvage." Jackson Marine Corp. v. Blue Fox, 845 F.2d 1307, 1309 (5th Cir. 1988) (citing Church v. Seventeen Hundred and Twelve Dollars, S F.Cas. 669 (S.D. Fla. 1853)) . In addition, a salvor forfeits any award where he is guilty of gross negligence, looting or spoilage of the salved property. Admiralty and Maritime Law 16-4 at 329.

Based in part on these legal standards the district court found no bad faith on the part of American Eagle or A.K. Steel for salvaging and transferring the steel:

First, [Douglas] Adams' testimony confirms that he knew that the salvaged steel had been abandoned by Duferco in July 1994. Adams knew that if he salvaged the steel he could claim a possessory right of salvage only since he did not own the steel. Adams specifically chose the one purchaser who agreed to this term, namely that American Eagle only warrant abandonment of the cargo but not warrant title. Adams accepted a significantly lower bid in order to obtain this term because the higher bidder insisted on warranty of title, which Adams knew he could not do. Likewise, A.K. Steel purchased the salvaged steel without warranty of title, assuming the risk that its title to the steel could be challenged by plaintiffs.

The Court is critically aware that the cargo would not have been salvaged but for the efforts of American Eagle and the American Eagle would not have bothered to salvage the cargo were it unable to line up an acceptable purchaser in advance of its efforts. American Eagle successfully salvaged 128 slabs of steel, and did so in good faith, notwithstanding American Eagle's failure to halt delivery of the salvaged steel to plaintiffs on April 27, 1995, upon their assertion of ownership. A.K. Steel purchased the salvaged steel in good faith without warranty of title and immediately consumed the steel into production.

The Court finds no 'bad faith' on either American Eagle or A.K. Steel based on their unresponsiveness to plaintiffs' demand that sale, delivery and consumption of the salvaged steel should halt at the instant it asserted its ownership interest. The letter of July 6, 1994, stated that the cargo was abandoned. Significantly, the letter did not provide that the cargo was abandoned to the underwriters or anyone else.

The Plaintiffs argue that the court erred in these conclusions. Plaintiffs reiterate many of their earlier arguments against American Eagle and A.K. Steel, which Plaintiffs suggest all point to bad faith. First, American Eagle attempted to sell the steel even though. it knew it did not have title. American Eagle and A.K. Steel were both knowledgeable salvors and should have known that the cargo belonged to someone else. They bought and sold property that was not theirs even after the Plaintiffs wrote them insisting that they cease salvaging the cargo. Finally, the district court concluded that American Eagle and A.K. Steel were liable for negligent conversion. These acts, the Plaintiffs argue, all point to bad faith.

We review the district court's factual findings for clear error. The record reveals that American Eagle and A.K. Steel may not have acted entirely in good faith. Perhaps, they did not act in good faith when they ignored the Plaintiffs' request that they halt the sale, delivery and consumption of the salvaged steel.

Nevertheless, the district court did not commit clear error in determining that American Eagle and A.K. Steel did not act in bad faith nor commit gross negligence, embezzlement, fraud, or corruption. Until the April 1995 letter from the Plaintiffs asking them to cease the sale of the cargo, the only other communication regarding the cargo stated that it had been "abandoned." As discussed above, the purpose of ICA's abandonment letter was not crystal clear. American Eagle had some basis to believe it could salvage the steel and at least transfer a possessory interest. Consequently, A.K. Steel could expect to receive a possessory interest in

the steel. American Eagle knew that it did not have title to the steel and never attempted to transfer title. We agree with the district court that American Eagle and A.K. Steel acted negligently but their behavior did not rise to bad faith under the law.

3. The 20 percent discount

The district court reduced the cargo's value by 20 percent because the steel was salvaged, which would cause concern about possible damage from submergence, and because American Eagle did not have the steel's chemistries. The Plaintiffs contend that it was clearly erroneous for the district court to apply this discount, and this court should reverse and amend the judgment to reflect the steel's true value of $895, 000.[16]

The court applied this discount based on the testimony of Plaintiffs' value expert George Hynson. He testified that if the chemistries of the steel were unavailable the price could be reduced by 5 to 20 percent. Hynson testified that the discount was based on the seller not possessing the composition chemistries of the steel, which placed the seller at a disadvantage in negotiations to sell the cargo. However, Plaintiffs argue that they had the chemistries to the steel.

The district court reduced the spot market price of the steel not only because a purchaser would not have the chemistries; but in addition, because a purchaser would be

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[16] This figure is based on a $300 per net tonnage for the steel multiplied by the total tonnage of the steel. The district court reduced this figure by 20 percent to $240, thereby arriving at the $716,400 value.

concerned about the possible damage from submergence or salvage. This is a realistic concern. Therefore, we conclude that the court did not commit clear error in reducing the price of the steel.

4. The sunken tug

Plaintiffs also argue that the district court committed clear extent of coverage is determined by the words of the policy. We construe the policy's words and phrases using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning. When the language is clear, the agreement must be enforced as written. Reynolds v. Select Properties, Ltd., 634 So.2d 1180, 1183 (La. 1994).

The policy's coverage provision states, "[i]nsurers agree to pay those sums that the Insured becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies . . . . The . . . 'property damage' must be caused by an '*occurrence*.' " (Emphasis added) . The policy defines '*occurrence*' as: "an *accident* including continuous or repeated exposure to substantially the same general conditions, which first take place during the policy period." (Emphasis added).

We look first to see if the events constituting conversion are within the coverage clause of this policy. Only if they are, do we consider the exclusionary provisions. We note that to have coverage the conversion of the steel must be an occurrence and to be an occurrence under this policy it must be an accident.

Black's Law Dictionary 15 (6th ed. 1990) defines an accident as "a fortuitous circumstance, event, or happening; an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens . . . ." As a salvor, American Eagle had the right to possess the steel and the duty to either return the steel to the Plaintiffs or file a salvage lien to obtain compensation. American Eagle did not do that. Instead, American Eagle intentionally transferred possession of the steel to A.K. Steel, who subsequently consumed the steel. This transfer, purchase and consumption negligently interfered with the Plaintiffs' ownership of the steel. Therefore, American Eagle and A.K. Steel committed negligent conversion.

This act was not an accident or a fortuitous event. American Eagle's and A.K. Steel's interference constituted more than an accidental or unexpected event. A reasonable person would not transfer, purchase and consume the steel without regard for the true owner's interest. Given the facts of this case, we conclude that American Eagle's and A.K. Steel's negligent conversion was not an accident, and thus is not covered by Britamco's insurance policy.

A.K. Steel contends that we should interpret American Eagle's negligent conversion pursuant to the policy's first exclusion to coverage, which provides that insurance does not apply to "' Property Damage' *expected or intended* from the standpoint of the insured." (Emphasis added). A.K. Steel notes that under some Louisiana law an occurrence clause includes intentional acts when the results

of the acts are unintended or unexpected. The Alert Centre, Inc. v. Alarm Protective Services, Inc., 967 F.2d 161, 164 (5th Cir. 1992). Therefore, it argues, the policy covers American Eagle's unintended negligent conversion. This argument is unpersuasive. First, because we concluded that negligent conversion was not an occurrence under the policy's coverage section, there is no need to apply the policy's exclusions. There is no coverage in the first place. Second, A.K. Steel cites case law which concerns policies having a broader definition of occurrence than Britamco's policy. See Id.; Auster Oil & Gas, Inc. v. Stream, 891 F.2d 570, 580 (5th Cir. 1990).

We reverse the district court and find no coverage under the Britamco policy. We therefore vacate the Plaintiffs' judgment against Britamco.

CONCLUSION

For the foregoing reasons, we affirm in part, reverse and remand in part, and reverse and vacate in part.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30875

FILED SEP 19, 2000

STEVEN HENRY ADAMS, for Himself and as Representative of Certain Underwriters at Lloyd's; INDEMNITY MARINE ASSURANCE COMPANY LTD; THE YORKSHIRE INSURANCE COMPANY LIMITED; COMMERCIAL UNION ASSURANCE COMPANY PLC; PHOENIX ASSURANCE PLC; CORNHILL INSURANCE PLC; NORWICH UNION FIRE INSURANCE SOCIETY LTD; MARITIME INSURANCE COMPANY LTD; THE NORTHERN ASSURANCE CO, LTD; SKANDIA UK INSURANCE PLC; OCEAN MARINE INSURANCE COMPANY; FOLKSAM INTERNATIONAL INSURANCE COMPANY (U.K.) LTD; SCOTTISH LION INSURANCE COMPANY LTD; WURTTEMBERGISCHE FEUERVERSICHERUNG AG; SPHERE DRAKE INSURANCE PLC; DAI-TOKYO INSURANCE COMPANY (U.K.) LTD

Plaintiffs - Appellees - Appellants -
Cross Appellants - Cross Appellees

V.

UNIONE MEDITERRANEA DI SICURTA; EL AL

Defendants

AMERICAN EAGLE MARINE, INC

Defendant - Appellee - Appellant
Cross Appellant - Cross Appellee

V.

AK STEEL CORPORATION, formerly known as, Armco Steel Company, L P

Defendant - Appellee - Cross Appellant

V.

UMS GENERALI MARINE S.P.A., formerly known as Union Mediterranea Di Sicurta'

Defendant - Appellant - Cross Appellee

V.

BRITAMCO UNDERWRITERS, INC

Defendant - Appellee - Appellant -
Cross Appellant - Cross Appellee

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITIONS FOR REHEARING

Before JONES, DUHE', and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing are DENIED.

ENTERED FOR THE COURT:

/s/ John M. Duhé, Jr.
United States Circuit Judge

APPENDIX D

U.S. Const. Art. III., § 2, cl. 1.

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

28 U.S.C. § 1254(l). Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1333. Admiralty, maritime and price cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

APPENDIX E

1. U.S. Foreign Waterborne Transportation Statistics, MARAD and U.S. Army Corps of Engineers (1999)

2. The U.S. Waterway System - Transportation Facts and Navigation Data Center U.S. Army Corps of Engineers (December 1999)

3. Casualty Salvage, International Salvage Union (October 2000) (internet reference http://www.marinesalvage.com/casualty.htm)